HARVARD
LAW REVIEW

VOL. XXXIII APRIL, 1920 NO. 6

A CONTEMPORARY STATE TRIAL — THE UNITED STATES *VERSUS* JACOB ABRAMS *ET AL.**

I

SHORTLY before eight o'clock, on the morning of August twenty-third, 1918,[1] several men and boys were loitering at the corner of Houston and Crosby streets, in New York City, perched on sprinkler hydrants or standing about in talk, while they waited for

* This article will form part of a book on Freedom of Speech, to be published by Harcourt, Brace, and Howe, New York City.

[1] The principal sources are the TRANSCRIPT OF RECORD, Supreme Court of the United States, October Term, 1919, No. 316, Jacob Abrams *et al.*, Plaintiffs-in-Error, *v.* The United States; the two briefs, and the opinions of the court in 40 Sup. Ct. Rep. 17 (1919), also reprinted in "The Espionage Act Interpreted," 20 NEW REPUBLIC, 377 (Nov. 26, 1919). Transcript and briefs are in the library of the Law School of Harvard University, in the complete set of United States Supreme Court records presented to the school by Justices Gray and Holmes. (See CENTENNIAL HISTORY OF HARVARD LAW SCHOOL, 112.) It has not been thought necessary to give references to the RECORD except for significant passages. Some information about the trial not contained in the RECORD is taken from current issues of the *New York Times* and the *New York Call*, or from personal conversation and correspondence; the sources of such unofficial data are indicated in every instance.

For criticism of the trial, see the pamphlet, SENTENCED TO TWENTY YEARS PRISON, published by the Political Prisoners Defense and Relief Committee, New York, 1919, "Our Ferocious Sentences," 107 Nation, 504 (Nov. 2, 1918).

Comment in support of the majority opinion of the Supreme Court will be found in a note, "The Espionage Act and the Limits of Legal Toleration," 33 HARV. L. REV. 442 (January, 1920); and in an article "Justice Holmes's Dissent," 1 REVIEW, 636 (December 6, 1919). The minority opinion is supported by a note, "Free Speech in Time of Peace," in 29 YALE L. J. 337 (January, 1920); and articles, "The Call to Toleration," 20 NEW REPUBLIC, 360 (November 26, 1919); "What is Left of Free Speech," Gerard C. Henderson, 21 NEW REPUBLIC, 50 (December 10, 1919). See note 72.

The United States official document on Russian internal affairs is, BOLSHEVIK PROPAGANDA, HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDI-

the day's work to begin in the manufacturing building close by. One or two happened to look up and saw something being thrown from a window above and falling — the air was full of leaflets. Nothing of the kind had ever happened there before, and the workmen picked the papers up curiously, from sidewalk and gutter. Some circulars in Yiddish they could not make head or tail of, but they read together others in English, which attacked the recent dispatch of troops to Russia.[2]

CIARY, United States Senate, Sixty-Fifth Congress, Third Session and thereafter, pursuant to Senate Resolutions 439 and 469; Washington, 1919.

A partial bibliography on the Espionage Act and freedom of speech generally is appended to "Freedom of Speech in War-Time," Zechariah Chafee, Jr., 32 HARV. L. REV. p. 932 (1919).

[2] These circulars are as follows. The English circular is Government's Exhibit No. 1, RECORD, p. 245:

"THE
HYPOCRISY
OF THE
UNITED STATES
AND HER ALLIES

"'Our' President Wilson, with his beautiful phraseology, has hypnotized the people of America to such an extent that they do not see his hypocrisy.

"Know, you people of America, that a frank enemy is always preferable to a concealed friend. When we say the people of America, we do not mean the few Kaisers of America, we mean the 'People of America.' You people of America were deceived by the wonderful speeches of the masked President Wilson. His shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.

"The President was afraid to announce to the American people the intervention in Russia. He is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.' Instead, he uttered beautiful phrases about Russia, which, as you see, he did not mean, and secretly, cowardly, sent troops to crush the Russian Revolution. Do you see how German militarism combined with allied capitalism to crush the russian revolution?

"This is not new. The tyrants of the world fight each other until they see a common enemy — WORKING CLASS — ENLIGHTENMENT as soon as they find a common enemy, they combine to crush it.

"In 1815 monarchic nations combined under the name of the 'Holy Alliance' to crush the French Revolution. Now militarism and capitalism combined, though not openly, to crush the russian Revolution.

"What have you to say about it?

"Will you allow the Russian Revolution to be crushed? YOU: Yes, we mean YOU the people of America!

"THE RUSSIAN REVOLUTION CALLS TO THE WORKERS OF THE WORLD FOR HELP.

"The Russian Revolution cries: 'WORKERS OF THE WORLD! AWAKE! RISE! PUT DOWN YOUR ENEMY AND MINE!'

The Military Intelligence Police arrested Rosansky, the Russian who threw out the circulars, and then with his aid entrapped six

---

"Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM.

"It is a crime, that workers of America, workers of Germany, workers of Japan, etc., to fight THE WORKERS' REPUBLIC OF RUSSIA.

"AWAKE! AWAKE, YOU
WORKERS OF THE WORLD!
REVOLUTIONISTS

"P. S. It is absurd to call us pro-German. We hate and despise German militarism more than do your hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House."

The Yiddish pamphlet, Government's Exhibit No 2 (RECORD, p. 247), has been translated. This translation was accepted as correct by the government and the defense. Abrams, however, suggested a few changes during his testimony. It would be interesting to know how much stronger the Yiddish equivalent for "murder" at the end of the fourth paragraph is than the word for "kill."

"WORKERS — WAKE UP.

"The preparatory work for Russia's emancipation is brought to an end by his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!

"America, together with the Allies, will march to Russia, not, 'God Forbid,' to interfere with the Russian affairs, but to help the Czecko-Slovaks in their struggle against the Bolsheviki.

"Oh, ugly hypocrites; this time they shall not succeed in fooling the Russian emigrants and the friends of Russia in America. Too visible is their audacious move.

"Workers, Russian emigrants, you who had the least belief in the honesty of our government, must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war. With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.

"You who emigrated from Russia, you who are friends of Russia, will you carry on your conscience in cold blood the shame spot as a helper to choke the Workers Soviets? Will you give your consent to the inquisitionary expedition to Russia? Will you be calm spectators to the fleecing blood from the hearts of the best sons of Russia?

"America and her Allies have betrayed [the workers]. Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

"Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that not only the Russian Worker fights for freedom, but also here in America lives the spirit of revolution.

"Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight.

"Three hundred years had the Romanoff dynasty taught us how to fight. Let all

other Russians, — five men and a girl. The oldest man was twenty-nine, the youngest man twenty-one, the same age as the girl. One prisoner died before trial, but the others were indicted for conspiracy to violate four clauses of the Espionage Act of 1918,[3] and tried in October in the United States District Court before Judge Henry D. Clayton. The author of the Clayton Act was summoned from Alabama to New York because of the crowded condition of the local docket. This was his first Espionage Act case.

The overt acts were proved without contradiction. Soon after United States troops were sent to Vladivostok, the group had begun meeting in the bare "third floor-back" on East 104th Street, where most of them lived, and decided to protest against the attack on the Russian Revolution, with which as anarchists or socialists they strongly sympathized. Schwartz, the dead prisoner, had written the Yiddish circular, and Lipman the English. Abrams, the oldest, bought a power press under chattel mortgage and installed it in a cellar. After printing five thousand copies of each circular he stopped for lack of funds. Lachowsky and Molly Steimer had distributed about nine thousand pamphlets, throwing them in the streets where there were the most working people or passing them around at radical meetings. Rosansky's aid had been secured just before the arrests. There was no evidence that one person was led to stop any kind of war work, or even that the pamphlets reached a single munition worker.

The defense, besides contending that the Espionage Act was unconstitutional, maintained that it was not violated, and in particular that the criminal intent required by the express terms of the statute did not exist. Each count of the indictment [4] covered one clause of the Act, as follows, according to the language of the statute. Certain phrases in the indictment which are not in the Act are enclosed in brackets.

"Whoever, when the United States is at war, . . . shall willfully utter, print, write, or publish

---

rulers remember this, from the smallest to the biggest despot, that the hand of the revolution will not shiver in a fight.

"Woe unto those who will be in the way of progress. Let solidarity live!

THE REBELS."

[3] The conspiracy section of the Espionage Act is Act of June 15, 1917, c. 30, title I, § 4; 40 STAT. AT L. 219; U. S. COMP. STAT. 1918, § 10212 d.

[4] The indictment is in RECORD, pp. 2–19.

"(Count 1) any disloyal, . . . scurrilous, or abusive language about the form of government of the United States, . . .

"(Count 2) or any language intended to bring the form of government of the United States . . . into contempt, scorn, contumely, or disrepute, . . .

"(Count 3) or . . . any language intended to incite, provoke, or encourage resistance to the United States [in said war with the German Imperial Government], . . .

"(Count 4) or shall willfully by utterance, writing, printing, publication, . . . urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products [to wit, ordnance and ammunition] necessary or essential to the prosecution of the war in which the United States may be engaged, [to wit, said war with the Imperial German Government], with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, . . .

"shall be punished by a fine of not more than twenty years or both."

As to the first crime charged, the publication of "disloyal, . . . scurrilous, or abusive language" about our form of government, the Espionage Act by its terms punishes the act of publication, without any mention of intent.[5] Although some district judges have con-

[5] Cases involving the new crimes created by the Espionage Act of 1918, reported in the BULLETINS of the Department of Justice on the Interpretation of War Statutes, the FEDERAL REPORTER, and the U. S. REPORTS, are as follows:

(1) Obstruction of war loans. United States *v.* Bold, BULL. 183 (Ore., Wolverton, J.); Hall *v.* United States, 256 Fed. 748, BULL. 189 (C. C. A. 4th, 1919, per Pritchard, J.).

(2) Disloyal, etc. language about form of government of United States. Abrams *v.* United States, 40 Sup. Ct. Rep. 17 (1919) (Clarke, J.; Holmes, J., dissenting).

(3) Language intended to defame form of government. Abrams *v.* United States, *supra.*

(4) Disloyal, etc. language about military or naval forces. United States *v.* Buessel, BULL. 131 (Conn., 1918, Howe, J.); United States *v.* Curran, BULL. 140 (S. D. N. Y., 1918, L. Hand, J.); United States *v.* Martin, BULL. 157 (E. D. Tenn., 1918, Sanford, J.; criticism of President's military policy is within this clause since he is commander-in-chief of army and navy); United States *v.* Equi, BULL. 172 (Ore., 1918, Bean, J.).

(5) Language intended to defame the military or naval forces. United States *v.* Equi, *supra;* United States *v.* Vevig, BULL. 162 (Alaska, 1918, Bunnell, J.).

(6) Disloyal, etc. language about flag. United States *v.* Buessel, *supra.*

(7) Language intended to defame the flag. United States *v.* Equi, *supra.*

(8) Language intended to incite, etc. resistance to United States or promote cause of enemies. United States *v.* Zademack, BULL. 143 (N. D. Ohio, 1918, Westenhaver, J.); United States *v.* Debs, BULL. 155 (N. D. Ohio, 1918, Westenhaver, J.); United States *v.* Martin, *supra;* United States *v.* Weist, BULL. 169 (E. D. Mo., 1918, Munger, J.); United States *v.* Equi, *supra;* United States *v.* Carlson, BULL. 185 (W. D.

sidered that there must be an evil or wicked intention,[6] it has been contended with much force and on high authority [7] that the utterance of the words is in itself criminal regardless of the state of mind. On this view, all that is necessary is intention to publish. There need be no intention to be abusive or disloyal about the form of government. If so, the Espionage Act is in this respect much more rigorous than the Sedition Act of 1798,[8] which created the crime of "publishing any false, scandalous and malicious writing against the government," but required intent to defame it or excite against it the hatred of the people or stir up sedition. Also the penalty was only two years' imprisonment, and truth was a defense under that Act, whereas now a statement in real or technical war-time of the soundest truths about our form of government is punishable by twenty years in prison if only those truths are sufficiently damaging to be considered abusive or disloyal.

However this may be, intention to injure is certainly material on the other three counts. Furthermore, the first and second counts may be dismissed at this point from further discussion. First, these clauses of the Espionage Act of 1918 punishing attacks on the Constitution and our form of government seem clearly unconstitutional. They have nothing to do with war. They may be used during some petty struggle with Haiti to arrest and imprison for twenty years an excitable advocate of the repeal of the Eighteenth Amendment or the abolition of the Senate. If there was one thing which the First Amendment was meant by our ancestors to protect, it was criticism

---

Wash., 1918, Neterer, J.); United States *v.* Albers, BULL. 191 (Ore., 1919, Wolverton, J.); United States *v.* Dodge, BULL. 202 (W. D. N. Y., 1919, Hazel, J.); 258 Fed. 300 (C. C. A. 2d, 1919, Rogers, J.); certiorari denied, 40 Sup. Ct. Rep. 10 (1919); Abrams *v.* United States, *supra*.

(9) Language urging curtailment of production of war materials. United States *v.* Carlson, *supra;* Abrams *v.* United States, *supra*.

(10) Favor cause of enemies or oppose that of United States. United States *v.* Buessel, *supra*; United States *v.* Zademack, *supra;* United States *v.* Schoberg, BULL. 149 (E. D. Ky., 1918, Cochran, J.); United States *v.* Bunyard, BULL. 168 (E. D. Mo., 1918, Munger, J.); United States *v.* Weist, *supra;* United States *v.* Bold, *supra;* United States *v.* Albers, *supra;* United States *v.* Dodge, *supra;* Schulze *v.* United States, 259 Fed. 189 (C. C. A. 9th, 1919, per Gilbert, J.).

[6] United States *v.* Buessel, BULL. 131; United States *v.* Martin, BULL. 157; United States *v.* Equi, BULL. 172.

[7] 33 HARV. L. REV. 442, 443, citing Learned Hand, J., in United States *v.* Curran, BULL. 104.

[8] Act of July 14, 1798, 1 STAT. AT L. 596.

of the existing form of government and advocacy of change, the kind of criticism which George III's judges punished. Even if the Act permits temperate discussion, which is doubtful, in view of the words about causing "contempt . . . or disrepute," it still abridges free speech, for the greater the need of change, the greater the likelihood that agitators will lose their temper over the present situation. It is impossible to speak respectfully of that portion of our form of government and Constitution which is represented by the electoral college. Other portions may prove equally objectionable in future. Also, even if these clauses of the Act are constitutional, there was no attack in the pamphlets on our form of government, but only upon those who were administering that government. Surely the phrase "capitalistic nation" does not constitute defamation of our political structure, which is compatible with other types of economic organization, such as national ownership of all industries. Although the heavy fines imposed on the defendants under these two counts necessitated some decision on their constitutionality or construction, the Supreme Court refused to make it, and Justice Clarke contented himself with suggesting that the distinction between abusing our form of government and abusing the President and Congress, the agencies through which it must function in time of war, might be only "technical."[9] If so, these sections of the Espionage Act must have been more frequently violated in Wall Street than in Harlem.

The controversy about this case must be limited to the third and fourth counts of the indictment. Aside from questions of constitutionality, the government had to establish the specific criminal intent required by the indictment and the Espionage Act. (1) It had to prove intention to publish the pamphlets, because of the word "willfully" and on general principles of *mens rea*. This it undoubtedly did. (2) Under the fourth count it had to prove intention to produce curtailment of munitions, because the words "urge, incite, advocate" create an offense analogous to criminal solicitation, which invokes a specific intent to bring about the overt act. There are some sentences in the Yiddish circular which show such an intention, although it is open to question whether an incidental portion of a general protest which is not shown to have come dangerously near success really constitutes criminal solicitation or amounts to advo-

[9] Abrams *v.* United States, 40 Sup. Ct. Rep. 17, 20 (1919).

cating. (3) At all events, the main task of the government was to establish under both counts an additional intention to interfere with the war with Germany, and the question whether it proved anything more than an intention to obstruct operations in Russia is the vital issue of fact in the case.

Since we had not declared war upon Russia, protests against our action there could not be criminal unless they were also in opposition to the war with Germany. There are two conceivable theories of guilt which might connect the circulars with the war. First, that the dispatch of troops to Siberia was "a strategic operation against the Germans on the eastern battle front," so that any interference with that expedition hindered the whole war. The second theory is, that the circulars intended to cause armed revolts and strikes and thus diminish the supply of troops and munitions available against Germany on the regular battle front.

Clearly the second theory is the only legitimate basis for conviction. The first theory would raise the complex question whether the Russian expedition was a part of the war. If this is a political question which must be answered in the affirmative on the mere *ipse dixit* of the government, then the existence of a war enables the government to withdraw the most remote and questionable policies from the scope of ordinary discussion simply by labeling them a war matter. The annexation of Mexico to prevent its becoming a base for German operations, the use of American troops to put down strikes in England or Sinn Fein in Ireland, are not more remotely connected with the war with Germany than the Russian affair. On the other hand, if the relation of such an expedition to the war is put in issue to be decided by the jury, the defense ought to be able to call witnesses to disprove it. On this account, in the Abrams case, Raymond Robins and other eyewitnesses of Russian affairs were summoned to prove that the Bolshevist and Czecho-Slovak situation was such that our intervention was not anti-German; but this testimony and all questions of the constitutionality of intervention were excluded by Judge Clayton with the remark, "The flowers that bloom in the spring, trala, have nothing to do with the case." [10]

That opposition intended to hinder the armed occupation of neutral territory should be *per se* criminal is so clearly a violation

[10] RECORD, pp. 120, 132.

of free speech that this view has been unanimously rejected by the United States Supreme Court in the Abrams case,[11] by the government brief,[12] and by writers[13] who support the decision. They have all adopted the second theory of guilt and have taken it for granted that the jury followed the same course. If so, the convictions represent a finding of fact that the defendants intended to interfere with operations against Germany directly and to embarrass or defeat the military plans of our government in Europe. Nevertheless, I believe that an examination of the record makes it highly probable that the jury convicted the defendants on just the other theory for, trying to hinder the Russian expedition. No one who recalls the publication of the Sisson documents[14] and the widespread popular identification of the Bolshevists with Germany in the summer and early autumn of 1918 can doubt that the jury would naturally regard pro-Bolshevist activities as pro-German, and that it was the duty of Judge Clayton to warn them explicitly against the Russian theory of guilt, and confine their attention to the pro-German theory. There is no trace of such a warning in the record. Instead, Judge Clayton himself repeatedly proclaimed the unsound theory of guilt, that if the defendants intended to oppose the government's Russian policy, they had *ipso facto* violated the law.

Before the defendants had put in any material testimony, he said:[15]

"Now the charge in this case is, in its very nature, that these defendants, by what they have done, conspired to go and incite a revolt; in fact, one of the very papers is signed 'Revolutionists,' and it was for the purpose of avoiding — a purpose expressed in the paper itself — the purposes of the Government and raising a state of public opinion in this country of hostility to the Government of the United States, so as to prevent the Government from carrying on its operations and prevent the Government from recognizing that faction of the Government of

[11] 40 Sup. Ct. Rep. 17, 19 (1919).

[12] Page 35, *ff.*

[13] "The Espionage Act and the Limits of Legal Toleration," 33 HARV. L. REV. 442; "Justice Holmes's Dissent," 1 REVIEW 636 (Dec. 6, 1919).

[14] War Information Series, No. 20 (October, 1918); the documents, without the historical report, are in BOLSHEVIK PROPAGANDA, ETC. (*supra*, note 1), p. 1125. The documents appeared in the public press by installments, beginning September 15, 1918. See the *New York Times* of that date. For criticism of their genuineness, see 16 NEW REPUBLIC, 209 (September 21, 1918), 107 NATION, 616 (Nov. 23, 1918), and the anti-Bolshevist book, E. H. WILCOX, RUSSIA'S RUIN, New York, 1919.

[15] RECORD, pp. 117, 118.

Russia, which the Government has recognized, and to force the Government of the United States to recognize that faction of the Government in Russia to which these people were friendly.

"Now, they cannot do that. No men can do that, and that is the theory that I have of this case, and we might as well have it out in the beginning."

The court told the jury that this statement was not part of the evidence and should be disregarded in passing on the issue of fact, but the harm was done and he took no steps to present any concrete alternative view. The second and legitimate theory of guilt was never stated by him. Instead, he continued to apply the Russian theory in his cross-examination of Lipman, for it is one of the remarkable features of this case that most of the cross-examination of the prisoners was not by the district attorney but by the court, who sometimes broke in upon the direct examination before half a dozen questions had been asked.[16] Lipman was testifying in response to his counsel that he had written the English pamphlet because the President after sending a telegram of sympathy to the Soviets[17] had a few weeks later dispatched a military expedition to Russia. Judge Clayton took over the witness:[18]

"'The President, you thought, and all that he was doing ought to be stopped and broken up?' 'I thought when I know he is elected by the people they should protest against intervention. . . . I did not want to break up. I called for a protest, which as I understand it, from my knowledge of the Constitution, the people of America had a right to protest.' . .

"'Did you not intend to incite or provoke or encourage resistance to the Government of the United States?' 'Not to the Government — never did.'

"'Who was acting for the Government if the President was not?' 'I thought it was the Congress and Senate that was supposed to represent the people of America.'

"'The President is the executive head . . . You intended to incite opposition to what the President did?' 'I did not. I intended to enlighten the people about the subject, for, as I stated, the papers were afraid to state it, and I thought it was the right time.'

[16] See the court's cross-examination of Abrams, RECORD, p. 163. The testimony not included in the RECORD shows much more questioning by the judge. See current issues of the *New York Times* and *New York Call*.

[17] NEW YORK TIMES CURRENT HISTORY (Part I), 49 (1918).

[18] RECORD, pp. 201–203.

"' . . . The Government acts through the President, and you intended to incite opposition to what he was doing?' 'I intended to incite opposition to every wrong act I understood to be wrong.'

"'You had the specific intention to make public opinion and arouse public opinion against intervention in Russia?' 'Yes.'"

When the judge also kept saying that the defendants' opinion of the legality of the President's action could not justify them in breaking the law,[19] he made anti-interventionist propaganda seem a crime in itself, and there was no need for the jury to consider whether they had any intention to prevent the shipment of munitions to the western front. There is nothing in the charge about such an intention, nothing to exclude Russian operations from the scope of the war. Therefore, it is very probable that the defendants were convicted on an erroneous theory of guilt, simply because they protested against the dispatch of armed forces to Russia.

However, it is maintained that the defendants did intend to hinder the fighting against Germany and might have been convicted on the second theory of guilt. There are three classes of evidence in the case bearing on their intention.

First, the two pamphlets speak for themselves.[20] Both plainly protest against our Russian policy and not against the war. The English circular emphatically repudiates the charge of pro-Germanism. It is nearly all expository, but throws in a few general exhortations which have been tossed about in every socialistic hall and street-meeting for seventy years since the Communist manifesto in 1848 until Justice Clarke discovered in 1918 that it was a crime in war-time to say, "Workers of the World! Awake! Rise! Put down your enemy and mine . . . Capitalism!"

"This," he declares, "is clearly an appeal to the 'workers' of this country to arise and put down by force the Government of the United States." [21]

If this be so, practically every socialistic book or pamphlet violates the Espionage Act, and the belief of American socialists that the Act was directed against their political existence as a party under the pretext of war finds ample justification. Military imagery ought not to be taken literally in radical propaganda,

[19] RECORD, pp. 115–121, 130–138, 167, 172, 173.

[20] Quoted *supra*, note 2.

[21] 40 Sup. Ct. Rep. 17, 18 (1919).

any more than in church hymns. Nothing could show better than this sentence of Justice Clarke's how peace-time statutes which are limited in terms to the advocacy of "force and violence" may be interpreted judicially to punish obnoxious radical opinions which call for working-class action without a single word to indicate that force is to be employed.

The Yiddish circular is more specific and calls for a general strike, which can no more be kept out of a radical pamphlet than King Charles's head could be barred from Mr. Dick's Memorial. We ought to hesitate a long while before we decide that Congress made such shop-worn exuberance criminal. Very likely, as Justice Clarke says, "This is not an attempt to bring about a change of administration by candid discussion," [22] — but how much political discussion is candid? If nothing but candid discussion is protected by the First Amendment, its value for safeguarding popular review of official acts is *nil*. And even if words like "fight" and "revolution" indicate violence though often used in a peaceable sense, the advocacy of strikes and violence is not a crime under this indictment unless intended to resist and hinder the war with Germany.

The second group of evidence consists of two manuscripts which were seized at the time of the arrests without a search warrant.[23] One, a yellow sheet of paper in handwriting, taken from Lipman, contains a passage about keeping the allied armies busy at home in order to save the Russian Revolution.[24] The other, some typewritten sheets found in a closet in Abrams' rooms on a pile of books and papers, urges at its close a similar policy, so that there will be no armies to spare for Russia, and adds that if arms are used against the Russian people, "so will we use arms, and they shall never see the ruin of the Russian Revolution." [25] Very little attention was given to these manuscripts at the trial or in either brief on appeal, but Justice Clarke says, after quoting the passages just mentioned:

---

[22] 40 Sup. Ct. Rep. 19 (1919).

[23] A contest could have been made on this point. Weeks *v.* United States, 232 U. S. 383 (1914); Silverthorne Lumber Co. *v.* United States, 40 Sup. Ct. Rep. 182 (1920). See Espionage Act, Title xi, 40 STAT. AT L. 228.

[24] Government's Exhibit 11, RECORD, pp. 250, 251. See also RECORD, pp. 45, 103; also p. 78, where Lipman, under examination by the military intelligence police, testified it meant soldiers were to be kept busy preventing and stopping protest meetings.

[25] Government's Exhibit 13, RECORD, pp. 252–255. See also RECORD, pp. 55, 104. The significant passages from both manuscripts are in 40 Sup. Ct. Rep. 17, 19 (1919).

"These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe."[26]

These excerpts form a small part of two long discussions wholly concerned with the wrong committed against Russia by both Germany and ourselves. The clear and only purpose is to stop Russian intervention. Much more important, these passages do not occur in the pamphlets for which the defendants were indicted. They are in manuscripts which were never printed. There is not the slightest testimony that any one intended to print them, or indeed that the author, Lipman, ever showed them to any one. What one man jots down and refrains from printing is very weak proof of what several other men intended when they printed something else. Finally, a comparison of the second or typewritten manuscript with the English pamphlet shows that it is only a first draft, and the omission in revision of all the passages on which Justice Clarke relies furnishes decisive evidence that such language did not express the actual intention of the defendants. All talk about keeping soldiers busy and using arms was thrown out, and the postscript denouncing German militarism was added. In other words, the one portion of the draft which might conceivably be regarded as favorable to Germany was deliberately dropped before printing, and a paragraph was substituted hostile to Germany and repudiating pro-Germanism.

Thirdly, we have the testimony of the defendants on the vital issue, whether they intended to defend the Russian Revolution by the methods of impulsive youth or intended to hinder us in our war against German militarism. All were born in Russia and had remained citizens of that country during their few years in the United States. All were anarchists except Lipman, and he was a socialist. Nothing in the case rebuts the natural inference that

[26] 40 Sup. Ct. Rep. 17, 19, 20 (1919).

such persons were devoted to Russian radicalism and bitterly hostile to Imperial Germany.

Abrams, under cross-examination by the district attorney, said that he had offered his services to the President to go to Russia and fight Germany, but permission had been refused.[27] Under cross-examination by the court, he denied that he intended to obstruct and hinder the government of the United States. His object was to help Russia. He did not believe in governments and was a revolutionist, rebelling against the conditions of life from twelve years of age, but that was only his philosophy. It had nothing to do with the pamphlets, the purpose of which was to protest against intervention.[28] On direct examination he testified that this was his sole purpose; that every Russian revolutionist was in favor of America's crushing German militarism; that he would go to Russia to fight it any time he had a chance; that he would help send propaganda from Russia to Germany to start a propaganda there, as he had done on the border of Austria and was sent to Siberia for it. As to the appeal for strikes, he called upon the workers here not to produce bayonets to be used against the workers in Russia.

"'I say it is absurd I should be called a pro-German, because in my heart I feel it is about time the black spot of Europe should be wiped out.'

"'You are opposed to German militarism in every form?' 'Absolutely.'

"'You would overthrow it and help overthrow it if you could?' 'First chance.'"[29]

The other defendants testified to the same effect. There is not a word in the whole Record to show that any prisoner was opposed to the war with Germany or had any intention except an absorbing desire to protest against intervention in Russia.[30]

It is hard to see how the jury could have convicted on this evidence if they had been instructed that a specific intent to hinder the war with Germany was necessary, but the charge contains nothing on this point except a mere repetition of the words of the

[27] RECORD, p. 197.

[28] RECORD, pp. 163, 164, 196.

[29] RECORD, pp. 182, 183, and see also 168, 180, 190.

[30] Lipman, page 756, *supra*, RECORD, pp. 77, 200, 203, 206; Lachowsky, RECORD, p. 223; Steimer, RECORD, pp. 82, 216, 221, 222.

statute. There is no comment on those words, no attempt to distinguish between a general intention to publish and the required specific intent. Instead, the judge charged, "People who have circulars to distribute, and they intend no wrong, go up and down the streets circulating them." [31] During the trial, although the defendants' counsel reminded him that Russian meetings in New York had been broken up, Judge Clayton said he would leave it to the jury whether throwing pamphlets out of windows squared with good, honest intention, and whether being anarchists and wanting to break up all government squared with honesty and sincerity of purpose in this case. Soon afterward he stated:

"If it were a case where the defendant was indicted for homicide, and he was charged with having taken a pistol and put it to the head of another man and fired the pistol and killed the man, you might say that he did not intend to do that.

"But I would have very little respect for a jury that would come in with a verdict that he did n't have any intent." [32]

Plainly these rulings of Judge Clayton ignore absolutely the specific intent to oppose or hinder the war with Germany, as demanded by the statute, and authorize the jury to convict the defendants for intention to publish the pamphlets and a generally bad mind.

The verdict against Abrams, Lipman, Lachowsky, Rosansky, and Molly Steimer, was guilty on all four counts. The acquittal of the other prisoner, Prober, was directed by the court.

Two features of the trial demand a passing notice. The method by which confessions were obtained from the defendants after arrest was not raised on appeal, since the overt acts were proved in other ways, but the testimony throws a significant light on the question, important to criminologists, of the treatment which political prisoners may expect in this country, especially if they be obscure aliens. The army sergeants deny threats and force,[33] but the charges of brutality are disquietingly specific and sincere.[34] The defendants and their counsel also insisted, but not so con-

[31] RECORD, pp. 237, 238.

[32] RECORD, pp. 159–161.

[33] RECORD, pp. 70, 75, 85.

[34] *New York Call*, October 17, 22, 23, 1918; and the pamphlet, "SENTENCED TO TWENTY YEARS PRISON," *passim*.

vincingly, that Schwartz's fatal illness resulted from the violence of one soldier, whom Judge Clayton relieved from the necessity of telling whether or not he was called by his associates, "The Tiger." The court observed, "There is no evidence as to who killed Schwartz any more than there was any evidence as to who killed cock robin." [35]

Legal historians have always taken interest in the criminal judge who jests with the lives of men.[36]

"'You keep talking about producers,' said Judge Clayton to Abrams. 'Now may I ask why you don't go out and do some producing? There is plenty of untilled land needing attention in this country.'

" . . . The witness said that he was an anarchist and added that Christ was an anarchist.

"'Our Lord is not on trial here. You are.' [37] . . .

"At another point the witness began some remarks about John D. Rockefeller.

"'Now,' said Judge Clayton, 'suppose we eliminate Mr. Rockefeller. He is not on trial. However, I will say that it is quite true that Mr. Rockefeller is a man of considerable wealth and he has done a great deal of good. He has eliminated the hookworm, which was the curse of childhood in large sections of our country; he has established and maintained a great research hospital, and in other ways used his wealth to better the condition of his fellows. We will now proceed with the case.'

"'We will now,' said Mr. Weinberger, 'ask the witness about his other writings. The Holy Alliance — '

"'Cut out the Holy Alliance. That is not in the issue. . . .'

"'When our forefathers of the American Revolution,— ' the witness began, but that was as far as he got.

"'Your what?' asked Judge Clayton.

"'My forefathers,' replied the defendant.

"'Do you mean to refer to the fathers of this nation as your forefathers? Well, I guess we can leave that out, too, for Washington and the others are not on trial here.'

---

[35] *New York Call*, October 23, 1918.

[36] The judge's words are taken *verbatim* from the *New York Times*, October 22, 1918, which was so far from being prejudiced against him that on October 28 it said editorially, "Judge Henry D. Clayton deserves the thanks of the city and of the country for the way in which he conducted the trial," and praised his "half-humorous" methods.

[37] Braxfield replied to a similar comparison, "Muckle he made o' that; he was hanget." See the account of how he tried Muir for sedition in R. L. STEVENSON, SOME PORTRAITS BY RAEBURN, and PHILIP A. BROWN, THE FRENCH REVOLUTION IN ENGLISH HISTORY, London, 1918, 95–99.

Abrams explained he called them that because, "'I have respect for them. We all are a big human family, and I say "our forefathers" . . . Those that stand for the people, I call them father.'" [38]

The day after conviction the prisoners were called before Judge Clayton for sentence. The court said:[39]

"I am not going to permit anybody to start anything to-day. . . . There will be no propaganda started in this court, the purpose of which is to give aid and comfort to soap-box orators and to such as these miserable defendants who stand convicted before the bar of justice. . . . You don't know anything about democracy, and the only thing you understand is the hellishness of anarchy. . . .

"These defendants took the stand. They talked about capitalists and producers, and I tried to figure out what a capitalist and what a producer is as contemplated by them. After listening carefully to all they had to say, I came to the conclusion that a capitalist is a man with a decent suit of clothes, a minimum of $1.25 in his pocket, and a good character.

"And when I tried to find out what the prisoners had produced, I was unable to find out anything at all. So far as I can learn, not one of them ever produced so much as a single potato.[40] The only thing they know how to raise is hell, and to direct it against the government of the United States. . . .

"But we are not going to help carry out the plans mapped out by the Imperial German Government, and which are being carried out by Lenine and Trotsky. I have heard of the reported fate of the poor little daughters of the Czar, but I won't talk about that now. I might get mad. I will now sentence the prisoners."

Rosansky was given three years in prison, Molly Steimer fifteen years and $500 fine, Lipman, Lachowsky, and Abrams twenty years (the maximum), and $1000 on each count. If they had actually conspired to tie up every munition plant in the country and succeeded the punishment could not have been more.[41]

[38] Abrams' reply is in RECORD, p. 194.

[39] *New York Times*, October 26, 1918.

[40] Abrams and Lachowsky bound books, Lipman produced furs, Rosansky produced hats, Molly Steimer produced shirt waists, Judge Clayton produced the Clayton Act.

[41] It would not be treason unless they were adherents of Germany. Therefore, they would be punishable only under the Espionage Act. The general statute on conspiracy to destroy by force the government of the United States imposes only six years. CRIM. CODE, § 6, U. S. COMP. STAT. 1918, § 10170. Conspiracies to limit the produc-

"'I did not expect anything better,' said Lipman.

"'And may I add,' replied the judge, 'that you do not deserve anything better.'" [42]

II

Seven judges of the Supreme Court were for affirmance of these convictions, Justice Clarke delivering the majority opinion. Justice Holmes read a dissenting opinion, in which Justice Brandeis concurred. The Supreme Court had only a limited power to correct any errors that may have occurred at the trial. It could not revise the sentences.[43] It could not set aside the verdict because its judges would have found differently on the facts themselves, but only if there was so little evidence of the required guilty intent that a reasonable jury could not have convicted. It would be very unlikely to grant a new trial for misdirection and failure to place properly before the jury the vital issue of specific intent to hinder the war, since no objection on this ground is noted in the bill of exceptions,[44] although as I have tried to show, the trial judge did nothing to enlighten the jury on the issues of specific intent and did much to becloud that difficult question, so that they very probably reached a verdict on entirely inadequate grounds, — the existence of intention to publish and to oppose Russian intervention. Only two real questions were before the court: the existence of the requisite specific intent under the third and fourth counts, the other two being disregarded, and whether the Espionage Act could constitutionally be interpreted to apply to this case.

The required specific intent to hinder the war with Germany

tion of necessaries are punishable under the Lever Act by two years. Act of August 10, 1917, c. 53, § 9, 40 STAT AT L. 279, U. S. COMP. STAT., § 3115 1/8 i.

[42] *New York Times, supra.* RECORD, p. 243, says, "I do not think you deserve anything less. Now, the next one."

[43] That excessive sentences may possibly constitute "cruel and unusual punishment" under the Eighth Amendment, see Weems *v.* United States, 217 U. S. 349 (1910), per McKenna, J., White and Holmes, JJ., dissenting.

[44] The Supreme Court has granted a new trial for unexcepted misdirection imperilling liberty. Wiborg *v.* United States, 163 U. S. 632, 659 (1896). *Accord*, Skuy *v.* United States, 261 Fed. 316 (C. C. A. 8th, 1919), and see August *v.* United States, 257 Fed. 388 (C. C. A. 8th, 1919), which holds that the Act of February 26, 1919, c. 48, amending Judicial Code, § 269, now authorizes an appellate court to look to the entire record and render judgment without regard to the technicality of want of exceptions. It is doubtful, however, if this statute does more than prevent reversals for non-prejudicial errors.

is worked out by Justice Clarke in this way: "It will not do to say . . . that the only intent of these defendants was to prevent injury to the Russian cause." They intended a general strike of munition workers, *i. e.*, a curtailment of production. This plan necessarily involved, before it could be realized, the paralysis and defeat of the war program of the United States. Therefore, the defendants intended such an interference with the war, since "men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." [45]

The "unfortunate maxim" propounded by the Justice is a pure fiction.[46] Obviously our acts result in many probable consequences which we do not intend. If he means that the defendants were liable for such consequences even if they did not in fact intend them, he states a principle of law which is applicable to some crimes but not to those in which the law requires a specific intent, as in the case at bar. In those crimes the defendant must actually have the defined state of mind.[47] Thus a man who broke into a barn at night and cut the sinews of a horse's leg to prevent his winning a race was not guilty of burglary with intent to kill a horse, even though in consequence of the injury the horse died.[48] It is needless to multiply examples. Even recklessness does not take the place of the state of mind demanded by the statute.[49] On the other hand, if Justice Clarke means that the jury may permissibly infer as a matter of fact from the doing of an act that the actor intends its ordinary consequences, this is true enough,[50] but such an inference is worthless if there is overwhelming express evidence that the defendant had an entirely different intention. That is the situation in the Abrams case, where the pamphlets and the defendants' testimony show that they intended to help Russia.

The majority opinion must rest on the first sentence quoted from Justice Clarke, that aiding Russia was not the only intent of these defendants. It is argued that they had two intents: (1) to

[45] 40 Sup. Ct. Rep. 17, 19.

[46] Jeremiah Smith, "Surviving Fictions," 27 YALE L. J. 147, 156 (1917).

[47] MAY, CRIMINAL LAW, 3 ed., § 34; 1 BISHOP, NEW CRIMINAL LAW, 8 ed., § 335; Roberts *v.* People, 19 Mich, 401, 415 (1870); Ogletree *v.* State, 28 Ala. 693, 701 (1856).

[48] Dobbs' Case, 2 East P. C. 513 (1770).

[49] United States *v.* Moore, 2 Lowell (U. S.) 232 (1873).

[50] Jeremiah Smith, *op. cit.*; People *v.* Scott, 6 Mich. 287, 296 (1859).

help Russia, (2) to hinder the war by curtailment of production in order to accomplish that object; that it is immaterial which intent was principal and which subordinate, so long as they both existed.[51] Thus if I throw a brick at a man behind a plate-glass window, my principal desire may be to hit him, but if that necessarily involves breaking the window and I know this fact, I have a secondary intention to break it and am guilty of intentional destruction of property, even though I would much rather not have broken the glass.[52] When a man was indicted for assault on another with intent to disfigure him by biting off his ear, it was useless for him to argue that he only intended to injure but not to disfigure, since the disfigurement was a necessary and obviously a known consequence of the intended act.[53]

There are several answers to this argument that one who intends a curtailment of munitions for any purpose must know that fewer munitions will hinder the war and therefore must *ipso facto* intend to hinder the war. First, the analogy of the throwing and biting cases just stated is too simple to have any application to the Abrams case. There is no such obvious and mechanical chain of cause and effect in complex social conditions. The argument supposes that the jury could pass on such obscure factors and that its finding meant (1) that the hindrance of the war was inevitable (2) that this inevitable consequence must have been in the defendants' minds. Both steps are very questionable, and a jury's opinion of them ought not to bind an appellate court. Of the first Justice Holmes says, "An intent to prevent interference with the Revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged."[54] Thus a very short strike that stopped intervention would have caused a very small loss in munitions for shipment to France, which would have been enormously offset by the release of troops and equipment previously diverted to Russia. And a different Russian policy might have created greater liberal enthusiasm in this country and elsewhere for the President's war aims. The second step ignores

[51] 1 BISHOP, NEW CRIMINAL LAW, 8 ed., § 339; Rex *v.* Gillow, 1 Moody C. C. 85 (1825).

[52] *Cf.* Rex. *v.* Pembliton, 12 Cox C. C. 607 (1874). A shooting analogy is given in 33 HARV. L. REV. 444, note.

[53] State *v.* Clark, 69 Iowa, 196 (1886).

[54] 40 Sup. Ct. Rep. 17, 21 (1919).

the belief of the defendants that a friendly Soviet Government would render valuable aid in attacking Imperial Germany by war, or at least by propaganda, whose effectiveness was proved within a fortnight after the conviction of Abrams and his friends.

Secondly, if every curtailment of munitions, whatever its purpose, is necessarily criminal under this Act, because of its alleged obvious and inevitable effect on the war, why does the Espionage Act take pains to limit the crime to "curtailment . . . *with intent . . . to cripple or hinder the United States in the prosecution of the war*"? [55] This clause is superfluous and meaningless, if every advocacy of curtailment involves such an intent. This clause about intent must add something to the rest of the definition of this crime. "Intent to hinder the war" clearly means more than the artificial lawyer-made intention to obstruct the war conjured up from any threat of a strike. The word "intent" in a very severe criminal statute, and especially a statute limiting popular discussion, must mean what any layman who wished to urge a strike in war-time lawfully would assume it to mean, that interference with the war must not be the object of his exhortation, the purpose at which he aims. Such a man would be entrapped if "intent" means an incidental, undesired, and at the most a vaguely considered consequence of his utterances.[56] Strikes are not ordinarily illegal, and it would be startling if Congress intended to prohibit all incitement to them in war. Naturally the statute confined itself to strikes and similar measures that were specifically planned to interfere with the war.

This is not, as has been charged, a confusion of intent and motive.[57] It is absurd to say that "interference with the war was

[55] It is significant that Justice Clarke omits this clause in quoting the indictment, and possibly he overlooked it altogether and assumed that intent to advocate curtailment of war essentials was the only intent specified in the Act.

[56] *Ibid.*, Holmes, J.: "When words are used exactly a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed — unless the aim to produce it is the proximate motive of the specific act . . ." The Sabotage Act punishes defective manufacture of war essentials only if there is intent to interfere with the war or reason to believe that the act will interfere with it. Act of April 20, 1918.

[57] "Justice Holmes' Dissent," 1 REVIEW, 636 (December 6, 1919). This article also censures Justice Holmes for not quoting the passage about keeping the armies at home. I hope I have shown reasons why it should never have been quoted by any judge.

palpably the *direct* and desired effect which these appeals were intended to produce" and aid to Russia only a motive. Justice Clarke expressly recognizes that the "primary intent" was to help Russia.[58] The defendants intended to produce certain tangible results, notably protest meetings, which in turn were intended to produce another tangible result, the end of intervention. Their motive was love for Russia. Possibly they also intended as part of their machinery of protest to produce a general strike, if intent can exist without any expectation of success. Interference with the war was at the most an incidental consequence of the strikes, entirely subordinate to the longed for consequence of all this agitation, withdrawal from Russia. It is wholly unsound to label the conjectural war consequence intent and the absorbing Russian consequence motive.

Finally, this argument of inevitable hindrance proves too much. If these defendants were guilty under the fourth count, so was every other person who advocated curtailment in the production of war essentials, no matter what his purpose. The machinists in Bridgeport who struck in defiance of the arbitration of the National War Labor Board violated the Espionage Act, although they intended to obtain higher wages. The Smith and Wesson Company violated it in refusing to continue to manufacture pistols under another arbitration, although they intended to retain an open shop.[59] The coal miners last autumn violated that Act in calling a strike. The government should have threatened all these people with the twenty-year penalty of the Espionage Act instead of acting under its general war statutes or imposing the milder rigors of the Lever Act and an injunction.[60]

In other words, the Supreme Court was construing not only a criminal statute which must be applied in a fashion which the laymen who are menaced by it will readily understand, but a statute

[58] 40 Sup. Ct. Rep. 17, 19.

[59] See these two cases in REPORT OF THE ACTIVITIES OF THE WAR DEPARTMENT IN THE FIELD OF INDUSTRIAL RELATIONS DURING THE WAR (Washington, 1919), 32–35.

[60] I have not troubled to apply similar reasoning to the third count of the indictment, because for reasons already stated I do not consider the pamphlets contained any advocacy of resistance to the United States. Consequently, that count should be disregarded like the first two. Holmes, J., says: "Resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. . . . There is no hint at resistance to the United States as I construe the phrase." 40 Sup. Ct. Rep. 17, 22 (1919).

limiting discussion and hence to be interpreted in the light of the First Amendment. It ought not to be assumed that Congress meant to make all discussion of any governmental measure criminal in war-time simply because of an incidental interference with the war. The danger of the majority view is that it allows the government, once there is a war, to embark on the most dubious enterprises, and gag all but very discreet protests against these non-war activities. To give extreme concrete examples: Irish munition workers could not have been urged to strike had our government been sending arms to Dublin Castle, because this would have lessened munitions for France, since a machinist could not be sure that any particular shell or gun was going to Ireland. Incitement to armed resistance to an executive edict nationalizing women would be opposition that might paralyze the war, and therefore easily suppressed under this Act.

On the constitutional point, little can be added to the statement of Justice Holmes. Although a dissenting opinion, it must carry great weight as an interpretation of the First Amendment, because it is only an elaboration of the principle laid down by him with the backing of a unanimous court in *Schenck* v. *United States*.[61]

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Since that case is reaffirmed by Justice Clarke this principle still remains law, greatly strengthened since the Abrams case by Justice Holmes' magnificent exposition of the philosophic basis of this article of our Constitution:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very founda-

[61] 249 U. S. 47, 52 (1919).

tions of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"[62]

The majority opinion dismisses this matter in two sentences, citing decisions on the Espionage Act of 1917 to establish the constitutionality of the far more objectionable provisions of the Act of 1918.[63] Furthermore, the court did not have to declare the clauses involved in the third and fourth counts void. Indeed, it cannot reasonably be doubted that they are constitutional when construed in accordance with the First Amendment. It is the same situation that Judge Hand pointed out in *Masses* v. *Patten*:[64] it is not a question of judicial refusal to enforce legislation, but of giving it a construction which will not limit discussion beyond the express terms of the Act. The words of the statute requiring a specific intent were presumably not meant by Congress to bear a meaning which would curb political agitation on matters unrelated to the war. The statute uses the ordinary language of criminal solicitation and attempt, and does not expressly demand the punishment of words in the absence of immediate danger or a determined purpose in itself dangerous to cause actual obstruction of the war. Therefore, it was erroneous for the court to construe it so as to make the remote bad tendency and possible incidental consequences of these pamphlets a valid basis for conviction. And even if all advocacy of curtailment of munitions be considered

[62] 40 Sup. Ct. Rep. 17, 22 (1919).

[63] *Ibid.*, 18.

[64] 244 Fed. 535, 538 (1917). See 32 HARV. L. REV. 960.

dangerous, the intent clause limits the crime and should not have been ignored. While the decision of the majority has done a lasting injustice to the defendants, its effect on the legal conception of freedom of speech should be temporary in view of its meager discussion of the subject and the enduring qualities of the reasoning of Justice Holmes.

In another place [65] I have written in support of this danger-test as marking the true limit of governmental interference with speech and writing under our constitutions, but the able and thoughtful criticism of that test in a recent number of this REVIEW [66] makes it imperative to say something more on the subject. In the first place, the First Amendment is something more than "an expression of political faith." It was demanded by several states as a condition of their ratification of the Federal Constitution, and is as definitely a prohibition upon Congress as any other article in the Bill of Rights. The policy behind it is the attainment and spread of truth, not merely as an abstraction, but as the basis of political and social progress. "Freedom of speech and of the press" is to be unabridged because it is the only means of testing out the truth. The Constitution does not pare down this freedom to political affairs only or to the opinions which are held by a majority of the people in opposition to the government. A freedom which does not extend to a minority, however small, and which affords them no protection when the majority are on the side of the government would be a very partial affair, enabling the majority to dig themselves in for an indefinite future. The editor's view that the Amendment does not protect a few of the people against the force of public opinion throws us back to the English trials during the French Revolution, and the Sedition Law of 1798, for which the United States through many years showed its repentance by pardoning all prisoners and repaying to them the fines imposed. A friend of Lovejoy, the Abolitionist printer killed in the Alton riots, said at the time that we are more especially called upon to maintain the principles of free discussion in case of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed.

---

[65] "Freedom of Speech in War-Time," 32 HARV. L. REV. 932.

[66] "The Espionage Act and the Limits of Legal Toleration," 33 HARV. L. REV. 442 (January, 1920).

Undoubtedly, although we are not infallible, we must assume certain opinions to be true for purposes of action; but this does not make it right or desirable to assume that they are true for the purpose of crushing those who hold a contrary doctrine.

"There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation." [67]

The vote of the majority of the electorate or the legislature is the best way to decide what beliefs shall be translated into immediate action, and the government must resist if its opponents begin to carry on the conflict of opinions by breaking heads instead of counting them. But it is equally inadvisable for the government to seek to end a contest of ideas by imprisoning or exiling its intellectual adversaries. Force seems like force to its victim, whether or not it has the sanction of law. No one will question that the government must resist a revolt, however Utopian in purposes, but the inference that logically it must also condemn all utterances "aimed at such subversion or tending solely thither" ignores the difference of degree emphasized by the First Amendment. It is the unfailing argument of persecutors. The opinions to which they object are always conceived to aim at revolution, violence, and nothing else, although such utterances are usually in large part the exposition of political and economic views. The advocates of parliamentary reform in England were condemned on just such reasoning. To throw overboard the danger-test, and permit "the suppression, whenever reasonably necessary, of utterances whose aims render them a menace to the existence to the state," inevitably substitutes jail for argument, since the determination of the vague test of "menace" depends on the tribunal's abhorrence of the defendant's views. It is no answer that this tribunal (outside of the crushing powers of the post-office and of the immigration officials in deportation cases) is a jury. A fitness to apply a common sense standard to alleged criminal acts bears no resemblance to a capacity to appraise the bad political and social tendency of unfamiliar economic doctrines during panic. The Abrams case shows the capacity of a judge to decide such a ques-

[67] MILL ON LIBERTY, c. II.

tion. The only tribunal which can pass properly on the menace of ideas is time.

We must fight for some of our beliefs, but there are many ways of fighting. The state must meet violence with violence, since there is no other method, but against opinions, agitation, bombastic threats, it has another weapon, — language. Words as such should be fought with their own kind, and force called in against them only to head off violence when that is sure to follow the utterances before there is a chance for counter-argument. To justify the suppression of the Abrams agitation because the government could not trust truth to win out against "the monstrous and debauching power of the organized lie" overlooks the possibility that in the absence of free discussion organized lies may have bred unchecked among those who upheld the course of the government in Russia.

The lesson of *United States* v. *Abrams* is that Congress alone can effectively safeguard minority opinion in times of excitement. Once a sedition statute is on the books, bad tendency becomes the test of criminality. Trial judges will be found to adopt a free construction of the act so as to reach objectionable doctrines, and the Supreme Court will probably be unable to afford relief.

Most of the discussion of the Abrams case has turned on the question whether the decision of the United States Supreme Court affirming these convictions was right or wrong. It seems to me much more important to consider the case as a whole, and ask how the trial and its outcome accord with a just administration of the criminal law.

The systematic arrest of civilians by soldiers on the streets of New York City was unprecedented, the seizure of papers was illegal, and the evidence of brutality at Police Headquarters is very sinister. The trial judge ignored the fundamental issues of fact, took charge of the cross-examination of the prisoners, and allowed the jury to convict them for their Russian sympathies and their anarchistic views. The maximum sentence available against a formidable pro-German plot was meted out by him to the silly futile circulars of five obscure and isolated youngsters, misguided by their loyalty to their endangered country and ideals, who hatched their wild scheme in a garret and carried it out in a cellar. "The most nominal punishment" was all that could possibly be in-

flicted, in Justice Holmes' opinion,[68] unless Judge Clayton was putting them in prison, not for their conduct, but for their creed. The wife of one prisoner has been deported to Russia without even a chance for farewell,[69] while he and his friends are condemned for their harmless folly to spend the best years of their lives in American jails. The whole proceeding, from start to finish, has been a disgrace to our law,[70] and none the less a disgrace because our highest court felt powerless to wipe it out. The responsibility is simply shifted to the pardoning authorities, who except for the release of the unlucky Rosansky have as yet done nothing to remedy the injustice, and to Congress which can change or abolish the Sedition Act of 1918, so that in future wars such a trial and such sentences for the intemperate criticism of questionable official action [71] shall never again occur in these United States.[72]

Zechariah Chafee, Jr.

HARVARD LAW SCHOOL.

---

[68] 40 Sup. Ct. Rep. 17, 22 (1919).

[69] Letter to the writer from Harry Weinberger.

[70] See Morley's indignation at the "thundering sentences" for sedition in India. 2 RECOLLECTIONS, 269.

[71] On armed intervention without Congressional authority, see the state papers of Seward and Fish, 6 MOORE'S DIGEST OF INTERNATIONAL LAW, 23 *ff.*; and Moorfield Storey, "A Plea for Honesty," 7 YALE REV. 260 (1918): "If any nation were to do any of these things to the United States, we should not doubt that it was making war on us."

[72] The following material should be added to the Bibliography. In support of the majority opinion is John H. Wigmore, "Abrams *v.* U. S.: Freedom of Speech and Freedom of Thugging in War-time and Peace-time," 14 ILL. L. REV. 539 (March, 1920), which erroneously states that the passages about keeping the allied armies busy at home were in the pamphlets distributed by the defendants, whereas they were in unimportant manuscripts. In favor of the dissenting opinion is the note by L. G. C., in 14 ILL. L. REV. 601.